IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1509

KIMON T. KARABATSOS,

Petitioner,

v.

REIN J. VANDER ZEE,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent Rein J. Vander Zee, through counsel, prays that this court deny issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered December 21, 1978.

OPINIONS BELOW

In addition to petitioner's recitation of the opinions below, the opinion of the United States Court of Appeals

for the District of Columbia Circuit is reported as *Vander Zee v. Karabatsos*, 589 F. 2d 723 (D.C. Cir. 1978).

COUNTERSTATEMENT OF THE CASE

Respondent Vander Zee was approached by the owner of an office building to assist it in renegotiating a lease for part of that building. Because Vander Zee was unable to devote sufficient time to such an undertaking, he offered to find the owner a person capable of the renegotiation, and Vander Zee would be compensated by that person he found. Tr. I, pp. 94. 142-3.[1]

Over a six week period Vander Zee considered over 200 persons and thoroughly screened approximately ten of these. Tr. I, pp. 127-29. During the screening process the name of petitioner Kimon T. Karabatsos was suggested to Vander Zee by Oliver J. Dompierre, Assistant to the Minority of the United States Senate. Tr. I, pp. 72, 96. Following discussions with Karabatsos and a meeting between Karabatsos and a representative of the building owner, Karabatsos and Vander Zee entered into an oral contract where, in return for Vander Zee's efforts to see that Karabatsos obtained the work from the building owner, Karabatsos would pay Vander Zee one-third of the gross fee received by Karabatsos. The formation of the contract was witnessed by Vander Zee's ex-wife. Vander Zee then made efforts to see that Karabatsos obtained the contract with the building owner, which contract Karabatsos did obtain. Tr. I, pp. 97-100, 58-9.

Karabatsos refused to perform his contract to pay Vander Zee, and Vander Zee brought this action. The

[1] The record herein will be cited as follows:
Tr. I, p. ___ : Transcript of Proceedings, February 1, 1977.
Tr. II, p. ___ : Transcript of Proceedings, February 2, 1977.

jury returned a verdict for Vander Zee. Tr. II, p. 213. The trial court, however, granted judgment *n.o.v.* to Karabatsos on the grounds that the evidence was insufficient to support the contract and that the contract was illegal. The trial court also conditionally granted Karabatsos a new trial on the grounds that the verdict was against the weight of the evidence.

On appeal by Vander Zee, the Court of Appeals held that the trial court had erred and reversed the entry of judgment *n.o.v.* for Karabatsos and reversed the conditional grant of a new trial. The case was remanded solely for a decision on whether to grant a new trial limited only to the issue of damages.

Karabatsos' petition for rehearing and suggestion for rehearing *en banc* was denied by the Court of Appeals.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DECISION REVERSING THE THE DISTRICT COURT'S CONDITIONAL GRANT OF A NEW TRIAL IS NOT ERROR

Rule 50(c)(1), F.R. Civ. P., requires that the trial court must rule on an alternative motion for new trial when it grants a motion for judgment notwithstanding the verdict. The Rule further provides that "[i]n case the motion for a new trial has been conditionally granted and the judgment [*n.o.v.*] is reversed on appeal, the new trial shall proceed *unless the appellate court has otherwise ordered.*" Emphasis added.

In this case, the trial court made such a conditional grant of a new trial, and such grant was reversed on appeal following reversal of the entry of judgment *n.o.v.*

Petitioner herein makes much of the 1963 amendments to Rule 50, F.R. Civ. P., and the trial court's discretion under that Rule. It is submitted, however, that this analysis does not go far enough. As the Advisory Committee noted, where an appellate court reverses the entry of a judgment *n.o.v.* and where a new trial had been conditionally granted, the appellate court " . . . may in an appropriate case also reverse the conditional grant of a new trial and direct that judgment be entered on the verdict."[2] *Report of Proposed Amendments to Certain Rules of Civil Procedure for the United States District Courts*, submitted by the Judicial Conference of the United States, 31 F.R.D. 621, 645-46 (1962). In support of the proposed amendment, which was adopted in 1963, the Advisory Committee cited, *inter alia, Dailey v. Timmer,* 292 F.2d 824 (3d Cir. 1961), explaining *Lind v. Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir. 1960), *cert. denied,* 364 U.S. 835 (1960).

It is submitted that petitioner fails to recognize the law regarding appellate review of the grant of a conditional new trial.

> At one time it was the law that the trial court's actions on motions [for new trial on the grounds that the verdict was against the weight of the evidence or excessive] was not reviewable at all, but the rule on this point has changed drastically in recent years . . . this is no longer the law. 11 Wright & Miller, *Federal Practice and Procedure* (1973), § 2818, p. 120.

[2] In reversing the conditional grant of a new trial, the Court of Appeals did not order entry of judgment on the verdict. While the Court noted its reluctance to perfunctorily affirm grants of new trials based on excessive damages, it remanded the case to the District Court to consider whether a partial new trial on damages was appropriate because that aspect of petitioner's motion was not passed upon by the trial court. *Vander Zee v. Karabatsos, supra,* 589 F.2d at 729.

Where the trial court is considering a motion for a new trial, there is potential tension between the trial courts's supervisory role, on the one hand, and the prevailing litigant's right to trial by jury and the fact finding role of that jury under the Seventh Amendment, on the other. In the case of appellate review, the tension is even greater where the appellate court reviews the denial of a new trial.

> There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial. In this instance the appellate court is not reexamining the facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. *Appellate action in this context protects the role of the jury, rather than running contrary to it.*
>
> Thus there is more to be said for the cases in which the grant of a new trial has been reversed, or in which the power to do so in clear cases has been asserted, than there is for those cases in which it is the denial of a new trial that is reversed. Wright & Miller, *supra,* § 2819, pp. 126-27, footnotes omitted, emphasis added.

In the landmark case of *Lind v. Schenley Industries, Inc., supra*, the Court clearly recognized the need for its exercise of its review powers in the Seventh Amendment context.

> [W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and credibility of the witnesses for that of the jury. Such an action effects a denigration of

> the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial. *Lind, supra*, at 90.

In *Lind*, as here, the case involved a contract, a matter which is "simple and easily understood by any intelligent layman." *Lind, supra*, at 91. Ultimately that case came down to a question of credibility, and the trial court's substitution of its judgment for that of the jury constituted an abuse of discretion. *Id.* As in *Lind, supra,* the court below held that the trial court's reweighing of the evidence did not justify the granting of a new trial and the verdict did not constitute a miscarriage of justice where the contract between the parties was legal, valid and enforceable. *Vander Zee v. Karabatsos, supra*, at 729.

Thus, petitioner submits that the decision by the court below is a clear and proper exercise of its review function and supervisory power as established in the Federal common law and Rule 50(c)(1), F.R. Civ. P.

II.

THE DECISION OF THE COURT BELOW DOES NOT PRESENT A CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

Respondent submits that petitioner's representations of inter-circuit disparity as a basis for the grant of his petition under Rule 19(1)(b) of the Rules of this Court are materially overstated.

In citing the Fifth Circuit standards, respondent ignores, *inter alia, O'Neil v.* W.*R. Grace & Company,* 410 F.2d 908 (5th Cir. 1969), and *Massey v. Gulf Oil Corporation*, 508 F.2d 92 (5th Cir. 1975). In *O'Neil, supra,* the court reversed judgment *n.o.v.* and the conditional grant of a new trial based on the weight of the evidence. The court quoted extensively from *Lind, supra*, and found no undesirable or pernicious element at trial and no useful purpose in submitting the same evidence to another jury. *O'Neil, supra*, at 914-15. In *Massey, supra*, the court relied upon *O'Neil* and *Taylor v. Washington Terminal Co.*, 133 U.S. App. D.C. 110, 409 F.2d 145 (1969), *cert. denied*, 396 U.S. 835 (1969), to closely scrutinize the evidence to evaluate the trial court's grant of a new trial in order to protect the litigants' right to jury trial. *Massey, supra*, at 94-5. In that case the grant of a new trial was affirmed.

Contrary to petitoner's representations, the Sixth Circuit also follows the *Lind* rule with respect to the grant of a new trial on the basis of sufficieny of the evidence. In *Duncan v. Duncan,* 377 F.2d 49 (6th Cir. 1967), the Court quoted extensively from *Lind* and, upon finding that the evidence of negligence in the first trial was not all that strong, that the jury was properly charged and that the first jury's verdict was a reasonable one, the Court concluded that " . . . it cannot be said that the District Court did not clearly abuse its discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence." 377 F. 2d at 55. See also, *Ross v. Chesapeake & Ohio Ry. Co.*, 421 F. 2d 329, 330 (6th Cir. 1970).

In the Seventh Circuit, the Court, quoting *Gebhart v. Wilson Freight Forwarding Co.,* 348 F.2d 129, 133 (3d Cir. 1965), stated:

> "If the evidence in the record, viewed from the standpoint of the successful party, is sufficient to support the jury verdict, a new trial is not warranted merely because the jury could have reached a different result. Neither the trial court nor this Court may substitute its judgment for that of the jury on disputed issues of fact." *Continental Air Lines, Inc. v. Wagner-Moorehouse, Inc.*, 401 F. 2d 23, 30 (7th Cir. 1968).

In *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973), the Eighth Circuit followed the lead of *Lind* and its progeny to hold that the trial court's grant of a new trial on sufficiency of the evidence in that case was an improper invasion of the jury's function and was an abuse of discretion. *Fireman's Fund, supra,* at 187-88.

In all these cases, while recognizing the discretion of the trial judge to conditionally grant new trials, the courts have balanced that discretion against the prevailing litigants' right to jury trial and the jury's function in evaluating the exercise of that discretion.[3] This exercise of the appellate courts' review function is fully in proper conformity with the Constitution and the intent of the 1963 amendments to Rule 50. See, *Report of Proposed Amendments, supra,* 31 F.R.D. at 645-46.

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[3]It is submitted that *United States v. F. D. Rich Co.*, 437 F. 2d 549 (9th Cir. 1970), *cert. denied*, 404 U.S. 823 (1971), does not support a showing of disparity. There the Court held that the trial court's discretion "will be left standing by this court absent a showing of abuse of discretion." *Id.*, 437 F.2d at 553. It does not hold for a "'clear showing'" as quoted by petitioner; thus, it does not conflict with *Lind* and its progeny where the exercise of the trial court's descretion is evaluated. Petitioner cited this case as *Acme Granite & Tile Co. v. F. D. Rich Co.* (Petition, p. 5).

In the case at bar, the Court below noted that, because the grant of a new trial was based upon the trial court's weighing the evidence differently from the jury, rather than upon legal error,[4] it must exercise closer scrutiny of the trial court's action. It found that there was sufficient evidence supporting the jurors' decision that the oral contract between Karabatsos and Vander Zee existed, and "[t]he trial court's contrary view of the credibility of the witnesses does not justify the granting of a new trial." *Vander Zee v. Karabatsos,* 589 F.2d at 729.

The District of Columbia Circuit did not adopt a "'strict scrutiny' test" as suggested by petitioner. (Petition, p. 6). Rather, the Court evaluated the evidence supporting the jury's verdict and decided that, upon its proper closer scrutiny of the exercise of the trial court's discretion, the trial court had abused its discretion when weighed against the right to trial by jury and the jury's fact finding function which are established and protected by the Seventh Amendment. This is not error.[5]

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[4]The Court of Appeals held that the contract which is the subject of this action is not illegal or unenforceable as against public policy, 589 F.2d at 727, n.4, thereby not making the jury's verdict a miscarriage of justice. *Id.* at 729.

[5]Petitioner also complains that the District of Columbia Circuit's decision would unduly limit the trial court's decision on the grounds that the verdict is a "miscarriage of justice". The trial court did address both the weight of the evidence and questions of illegality, as did the Court of Appeals. In both instances, the trial court was found to have erred, and, it is submitted, petitioner's contentions are without foundation.

III.

THE COURT OF APPEALS PROPERLY CONSIDERED THE ISSUES BEFORE IT.

At the outset, respondent submits that the questions raised by petitioner relating to mutuality of assent in the formation of the contract, unenforceability of the contract on public policy grounds, and legal ethics are not appropriate grounds for the grant of a petition for certiorari under Rule 19 of the Rules of this Court.

A. The Court of Appeals Properly Considered and Passed Upon the Question of Mutuality of Assent in Reversing the Trial Court.

In its opinion, the Court of Appeals reviewed the evidence in the case and found that there was substantial and sufficient evidence to support the jury's factual determination that there was the requisite mutuality of assent in the formation of the contract. *Vander Zee v. Karabatsos, supra,* 589 F.2d at 725-27.

Petitioner's advocacy concerning his view of the evidence does not make it so. The jury, not having been subjected to any undesirable or pernicious influence obtruding into the trial, properly exercised its fact finding role under the Seventh Amendment and found that there is a contract between Vander Zee and Karabatsos and found what the terms of the contract are. The Court of Appeals, in turn, properly exercised its reviewing function and supervisory authority to reverse the entry of judgment *n.o.v.* and the conditional grant of a new trial. See, *Lind, supra,* 278 F.2d at 90; *Taylor v. Washington Terminal Co., supra,* 409 F.2d at 148.

B. The Court of Appeals Properly Determined that the Contract Was Not Unenforceable as Against Public Policy.

The Court of Appeals determined that the contract between Vander Zee and Karabatsos was not void as against public policy, and this question is fully addressed by the Court, 589 F.2d at 727, n.4. Further, despite petitioner's protestations, there is nothing in the record to support a finding of government "influence peddling" by Vander Zee.

Therefore, respondent submits that the Court of Appeals did not err.

C. There Was No Basis for the Court of Appeals to Address the Legal Ethics Question Raised by Petitioner.

Respondent [redacted] is licensed to practice law in the District of Columbia and Texas. Yet, there is nothing in the record to support petitioner's contention that the question of legal ethics was an issue; in fact, petitioner even states "*to the extent* that he was acting *qua* lawyer" respondent's actions were improper (Petition, p. 9, emphasis added) and can make no showing that respondent was acting as an attorney at law. In fact, the record demonstrates that the contrary was true.

The issue of legal ethics was raised by petitioner for the first time before the Court of Appeals. Inasmuch as that record does not support even beginning the consideration of any legal ethics issues, the Court of Appeals did not err in declining to treat that issue in its written opinion.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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